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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1965

No. 676

NORTHWESTERN RAILROAD COMPANY,
*Appellant,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
and
CITY OF SAN RAFAEL, et al.,
*Appellees.*

**On Appeal from the Supreme Court of the State of California**

## MOTION TO AFFIRM

Appellees City of San Rafael, et al., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the decision of the Supreme Court of the State of California, denying petition for writ

of review of the decision of the Public Utilities Commission of California, be affirmed on the ground that the questions presented are so insubstantial as not to warrant further argument.

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## STATEMENT

On November 23, 1964, this Court affirmed the decision of a three-judge Federal District Court in the Northern Division of California which had in turn sustained an order of the Interstate Commerce Commission denying authority to appellant Northwestern Pacific Railroad Company (hereinafter referred to as NWP) to abandon the Puerto Suello Tunnel on its main line near San Rafael, California. *Northwestern Pacific Railroad Company v. Interstate Commerce Commission, et al.*, October Term, 1964, No. 381, 379 U.S. 132 (1964), affirming *Northwestern Pacific Railroad Company v. United States of America, et al.*, 228 F.Supp. 690 (1964). The decision of the Interstate Commerce Commission was reported under the name *Northwestern Pacific Railroad Company—Abandonment between San Rafael and Forbes Overhead (Puerto Suello Tunnel), Marin County, California,* 320 ICC 19 (1963).

The Puerto Suello Tunnel has been abandoned *de facto* since it was damaged by fire on July 20, 1961.

Following the aforementioned Federal District Court decision upholding the Interstate Commerce Commission, the Public Utilities Commission of the State of California (hereinafter referred to as PUC) instituted an investigation which, following a hearing and the filing of briefs, culminated in a PUC order of September 22, 1964, requiring appellant to repair the tunnel and restore the

same rail service via the tunnel as was provided prior to the fire. The PUC order is set forth as Appendix C of the Jurisdictional Statement. It is reported at 63 Cal. PUC 368.

The PUC's order was issued for the express purpose of supplementing and implementing the Interstate Commerce Commission's order denying a certificate to abandon. The PUC acted after concluding that the NWP would likely continue to delay reconstruction of the tunnel even after affirmance by this Court of the ICC's determination unless there were an affirmative order to reconstruct. (This Court did subsequently affirm the ICC's determination, as pointed out above; as the PUC anticipated, NWP has ignored the ICC's determination and has kept the tunnel closed.)

NWP filed a petition for writ of review of the PUC decision with the Supreme Court of the State of California. Following the filing of answers by appellees PUC and City of San Rafael, et al., the petition was denied on March 10, 1965 (S.F. No. 21861). Rehearing was denied on April 21, 1965.

On August 10, 1964, NWP, while continuing to ignore its obligation as already determined by the ICC and as then affirmed by the Federal District Court, filed a new application for authority to abandon the same line of railroad. Finance Docket No. 23249. While NWP asserts in its Jurisdictional Statement that motions to dismiss such new application have finally been denied, and that hearings are scheduled, the facts are otherwise. Hearing has been postponed indefinitely, and motions to dismiss are under consideration.

Appellant's Jurisdictional Statement, page 9, page 12-14, discusses certain alleged storm damages incurred by appellant on a portion of its line not involved in the instant case in Christmas week of 1964. Appellant has improperly raised the question of those damages before this Court. While the storm occurred after appellant had filed its petition for writ of review with the California Supreme Court, the matter was pending before that court long after the claimed damage and yet appellant did nothing to bring it to the attention of that court until some time after that Court had denied review. Also appellant did nothing at any time to bring any contention of storm damage before the PUC although being well aware that the PUC "may at any time . . . rescind, alter or amend any order or decision made by it". California Public Utilities Code, Section 1708.

Reference to the alleged storm damage in appellant's Statement of Facts, and in the body of appellant's Jurisdictional Statement, is improperly presented before this Court, since the storm damage was not raised below in a timely fashion.

The Argument which follows considers the appellant's "Questions Presented" in the order in which appellant lists them. Appellant has not presented any substantial federal question.

## ARGUMENT

### 1. THE CALIFORNIA PUBLIC UTILITIES COMMISSION HAD JURISDICTION TO MAKE ITS ORDER REQUIRING REPAIR OF THE TUNNEL AND RESTORATION OF FORMER RAIL SERVICE

Section 1(20) of the Interstate Commerce Act, 49 U.S.C. Section 1(20), contains no language indicating that the remedy it provides for an illegal abandonment is exclusive. Appellant's construction of Section 1(20) must therefore be by implication. No such implication arises by virtue of the purpose of Section 1(20).

There is absolutely no conflict between the scheme of regulation created by Congress and the action taken here by the California Public Utilities Commission. The PUC acted in congruence with the Interstate Commerce Commission's determination that public convenience and necessity do not permit abandonment of the tunnel. This mode of procedure was upheld in the Los Angeles *Union Terminal* cases.[1]

In the *Union Terminal* cases the Interstate Commerce Commission considered the question of public convenience and necessity as it concerned interstate commerce, and issued certificates permitting the extensions and abandonments which were required in connection with the construction of the Union passenger station. Then, the California Commission affirmatively ordered the railroads to take physical action in conformity with the findings of the Interstate Commerce Commission. This Court held

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[1] *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 331 (1924);
*Interstate Commerce Commission v. United States*, 280 U.S. 52 (1929);
*Atchison, T. & S.F.R.Co. v. Railroad Commission*, 283 U.S. 380 (1931).